

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE: ZIMMER NEXGEN KNEE IMPLANT PRODUCTS LIABILITY LITIGATION	§	MDL NO. 2272
	§	Master Docket Case No.: 1:11-cv-05468
	§	ALL CASES
This Document Relates to All Cases	§	JUDGE REBECCA PALLMEYER
	§	

**PLAINTIFF REPLY IN FURTHER SUPPORT OF A PLAINTIFFS' STEERING
COMMITTEE AND THE INCLUSION OF KAREN H. BEYEA-SCHROEDER**

A motion was made to form a Plaintiffs' Steering Committee, and other Plaintiffs then moved to be part of the Plaintiffs' Steering Committee (PSC). The Defendants object to the application for a Joint Prosecution Group arguing the numbers to be sufficient for the Plaintiffs' PSC. However, given the number of anticipated cases and amount of anticipated work to be done in this Zimmer NexGen Knee Implant Products Multi-District Litigation ("MDL"), a PSC with a number of attorneys, and one that includes the applicant Karen H. Beyea-Schroeder in addition to the proposed Joint Prosecution Group panel, would assist in better coordination and efficiency in this MDL.

First and foremost, "a number of courts have concluded that defendants lack standing to challenge" factors regarding the formation of a PSC. *In re Enron Corp. Securities Litigation*, 206 F.R.D. 427, 439 (S.D.Tex. 2002). (citing e.g., *Takeda v. Turbodyne Technologies, Inc.*, 67 F.Supp. 2d 1129, 1138 (C.D.Cal. 1999); *Gluck v. CellStar Corp.*, 976 F.Supp. 542, 547, 550 (N.D.Tex. 1997); *Greebel v. FTP Software, Inc.*, 939 F.Supp. 57, 60–61 (D.Mass. 1996); *Fischler v. AmSouth Bancorporation*, 1997 WL 118429, *2 (M.D. Fla. 1997); *Zuckerman v. Foxmeyer Health Corp.*, 1997 WL 314422, *2 (N.D.Tex. 1997); *In re Nice Systems Securities*

Litig., 188 F.R.D. 206, 218 n. 11 (D.N.J. 1999)). In addition, it is highly uncommon that one party selects their adversary's counsel or representative. In fact, the Defendants' position to limit the number of counsel to four or less, is contrary to the *Manual of Complex Litigation*.

A multidistrict litigation is to "...promote the just and efficient conduct." 28 U.S.C. § 1407(a). To achieve this goal, such complex litigation requires early coordination of counsel to avoid confusion and to promote judicial economy. *Manual of Complex Litigation (Fourth)* § 10.22. The reason for this is that the attorney demands, and number of attorneys, in a complex litigation are greater than that in normal litigation. See *Manual for Complex Litigation (Fourth)* § 10.21.

The attorney demands in a complex litigation require that a number of attorneys work together to expedite the litigation, share costs and promote time efficiency. *In re Milestone Scientific Securities Litigation*, 187 F.R.D. 165, 176 (D.N.J. 1999)(citing *In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998)(discussing the appointment of lead counsel in securities litigation type of cases). The appointment of multiple plaintiffs for the PSC allows "for pooling, not only of the knowledge and experience, but also of the resources of the plaintiffs' counsel in order to support what could be a costly and time-consuming litigation." *In re Oxford Health Plans, Inc. Securities Litigation*, 182 F.R.D. 42, 47 (S.D.N.Y. 1998). Therefore the establishment of lead counsel and a steering committee of lawyers will "limit and manage discovery, etc. to minimize expenses to all litigants and to provide judicial efficiency." *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.*, 953 F.2d 162, 165 (4th Cir. 1992).

Frequently the Court establishes a PSC whose

responsibilities [then] include initiating, coordinating, and conducting all pretrial discovery on behalf of plaintiffs; acting as a spokesperson for plaintiffs during pretrial proceedings; negotiating and entering into stipulations with defendant; developing and

pursuing settlement options with defendant; creating a method for reimbursement for costs and fees for services; and dealing with liens on a national basis.

In re Zyprexa Products Liability Litigation, 467 F.Supp.2d 256, 266 (E.D.N.Y. 2006).

Based on these factors, and the Defendants' own position, a team of lead counsel and a PSC, including this movant, would be proper. This is a new litigation, and despite its age, already there a large number of cases filed. This number will only grow as the Defendants recalled over 68,000 MIS implants and there are hundreds of thousands of flex implants in the stream of commerce.

In addition to the number of cases growing, there is a large amount of common discovery, and therefore large responsibility, in this Multi-District Litigation. The Defendants themselves explained that this litigation will entail:

- Discovery regarding eight products with witnesses and documents unique to each;
- Depositions regarding the six different Zimmer employee teams who designed the products at issue;
- Review of Zimmer documents regarding each of the products' designs, manufacture, regulatory approval, marketing and post-market surveillance; and
- Depositions of Zimmer employees in charge of the manufacture, regulatory approval, marketing and post-market surveillance for the Zimmer products at issue.

See Exhibit A, Affidavit of Michelle Zawadzski. In addition to this discovery, which the Defendants themselves have identified as being necessary, is other common work such as

motions, written discovery requests (such as Requests for Production of Documents and Interrogatories), status reports to the Court, arguing common positions to the Court, monitoring all plaintiffs counsel to ensure schedules are met and unnecessary expenditures of the Court and Defendants' time is avoided, and issuing subpoenas to non-parties who may be relevant to this matter.

Therefore, a reasonably sized PSC is required to complete this anticipated discovery in a timely and efficient manner. The PSC panel submitted to this Court and movant together offer the responsibility, time, effort, expertise, money and resources needed to complete the above anticipated discovery in a timely and efficient manner. Only with an appropriate number of Plaintiffs' counsel for the PSC can this litigation move along efficiently and discovery proceed at a reasonable pace, such as the twenty-one attorneys appointed in the *In re: DePuy Orthopedics, Inc. ASR Hip Implant Products Litigation* (MDL 2197), the twenty attorneys appointed in the *In re: Medtronic, Inc., Sprint Fidelis Leads Product Liability Litigation* (MDL 1905), or the twenty three attorneys appointed in the *In re: Guidant Corp. Implantable Defibrillators Products Liability Litigation* (MDL 1708).

Finally, the Defendants rely on two cases for their brief, *In re Milestone Scientific Sec. Litig.*, 187 F.R.D. 165 (D.N.J. 1999) and *Vincelli v. Nat'l Home Health Care Corp.*, 112 F.Supp. 2d 1309 (M.D. Fla. 2000). However, reliance on these cases is misplaced. Both of the Defendants' cases involve securities issues and the panel in those cases was established pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "PSLRA") and for class actions. Under PSLRA, different guidelines are used, compared to non-securities litigation, for the appointment of lead counsel and a Plaintiffs' Steering Committee. *Id.* Under PSLRA, the plaintiff with the largest financial interest has the rebuttable presumption of being

the lead counsel for the class action as they have the most at stake and therefore the most in common with other plaintiffs. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii).

III. Conclusion

Therefore, based on the foregoing legal and factual arguments contained herein, as well as in the previously submitted application, it is respectfully submitted that this movant, Karen H. Beyea-Schroeder, be appointed to the Plaintiffs' Steering Committee along with the proposed panel. Defendants' arguments to limit the number of lead counsel and/or PSC is without merit and merely an effort to limit the Plaintiffs' abilities to adequately pursue these cases on their merits. This proposed team of attorneys, including movant, would provide the resources, expertise, commitment, and availability to commit to this important project. I therefore respectfully seek Your Honor's appointment.

Dated: September 9, 2011

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.

/s/Karen Beyea-Schroeder
Karen Beyea-Schroeder
Texas Bar No. 24054324
George M. Fleming
Texas Bar No. 07123000
1330 Post Oak Boulevard, Suite 3030
Houston, TX 77056
Telephone: (713) 621-7944
Facsimile: (713) 621-9638
Email: karen_beyea-schroeder@fleming-law.com

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Illinois, using the electronic case filing system of the Court, via first class mail for those who do not have identified email addresses on the CM/ECF case filing system and the below referenced attorneys not referenced on the CM/ECF service list:

/s/Karen Beyea-Schroeder

Vincent J. Moccio
Genevieve M. Zimmerman
Robins, Kaplan, Miller & Ciresi, LLP
2800 LaSalle Plaza
Minneapolis, MN 55402-2015
(612) 349-8500
Fax: 612-339-4181
Email: vjmoccio@rkmc.com
Email: gmzimmerman@rkmc.com

Caleb L.H. Marker
Ridout & Lyon LLP
555 East Ocean Boulevard Suite 500
Long Beach, CA 90802
562-216-7380
Fax: 562-216-7385
Email: c.marker@ridoutlyonlaw.com

Ari Kresch
Kresch Oliver
24100 Southfield Road, Suite 100
Southfield, MI 48075
249-327-6556
Fax: 248-436-3385
Email: akresch@1800lawfirm.com

Alyson Oliver
Kresch Oliver
24100 Southfield Road, Ste. 305
Southfield, MI 48075
249-327-6556
Fax: 248-436-3385
Email: AOliver@krescholiver.com

Andrew L. Davick
Anthony J. Nemo
Meschbesher & Spence, Ltd
1616 Park Ave. S
Mpls, MN 55404
612-339-9121
Fax: 612-339-9188
Email: adavick@meshbesher.com
Email: tnemo@meshbesher.com

Chad Dudley
Dudley DeBosier
1075 Government St.
Baton Rouge, LA 70809
225-379-3333
Email: cdudley@dudleydebosier.com

Daniel Christopher Burke
Parker Waichman Alonso LLP
6 Harbor Park Drive
Port Washington, NY 11050
Email: dburke@yourlawyer.com

Douglas Robert Plymale
Plymale Law Firm
One Canal Place
365 Canal St., Suite 1000
New Orleans, LA 70130
504-355-0092
Email: dplymale@dugan-lawfirm.com

Douglass A. Kreis
Aylstock, Witkin, Kreis & Overholtz, PLLC
17 East Main Street, Suite 200
Pensacola, FL 32502
850-202-1010
Fax: 850-916-7449
Email: dkreis@awkolaw.com

Herbert Orlandah Phillips, IV
McGuire Wood & Bissette
48 Patton Avenue
Asheville, NC 28802
828-254-8800
Email: hphillips@mwbav1.com

John Jeremy Mahoney
Mahoney & Mahoney
P.O. Box 355
Center, ND 58530
701-794-8769
Email: jmahoney@westriv.com

Jon C. Peeler
The Norman Law Building
213 Third Avenue, N
Nashville, TN 37201
615-250-8000
Fax: 615-250-8073
Email: jonpeeler@aol.com

Joseph A. Osborne
Babbitt, Johnson, Osborne & LeClainche, P.A.
1641 Worthington Road, Suite 100
West Palm Beach, FL 33409
561-684-2500
Fax: 561-684-6308
Email: JAOSborne@babbitt-johnson.com

Kevin Patrick Weis
Goldberg & Simpson, LLC
9301 Dayflower Street
Louisville, KY 40059
502-589-4440
Fax: 502-581-1344
Email: kweis@goldbergsimpson.com

Michael A. London
Douglas & London
111 John Street, 8th Floor
New York, NY 10038
Email: mlondon@douglasandlondon.com

Paul J. Pennock
WEITZ & LUXENBERG PC
700 Broadway
New York, NY 10003
212-558-5504
Fax: 212-363-2721
Email: PPennock@weitzlux.com

Richard J. Arsenault
NEBLETT, BEARD & ARSENAULT
2220 Bonaventure Court
P.O. Box 1190
Alexandria, LA 71309
800-256-1050
Fax: 318-561-2591
Email: rarsenault@nbalawfirm.com

Jason J. Thompson
Sommers Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075
248-355-0300
Email: jthompson@sommerspc.com

Sheila M. Bossier
1520 N. State Street
Jackson, MS 39202
601-352-5450
Fax: 601-352-5452
Email: sbossier@bossier-law.com

Stacy K. Hauer, Esq.
Johnson Becker, PLLC
33 South Sixth Street, Suite 4530
Minneapolis, MN 55402
612-333-4663
Fax: 612-339-8168

Mark E. Gebauer
Ecker Seamans Cherin & Mellott, LLC
213 Market Street
Eighth Floor
Harrisburg, PA 17101
717-237-6052
Fax: 717-237-6019
Email: mgebauer@eckertseamans.com

Kurt Edward Stitcher
Baker & Daniels LLP
311 S. Wacker Drive #4400
Chicago, IL 60606
312-212-6500
Email: kurt.stitcher@bakerd.com